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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANTS DISCOVERY COMMUNICATIONS, INC. AND THE LEARNING CHANNEL, INC.

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ARGUMENT

I. THE GOVERNMENT ERRS IN ARGUING THAT HEIGHTENED SCRUTINY DOES NOT APPLY

The Solicitor General contends that the district court was mistaken in applying the *O'Brien* test and instead "should have applied the less demanding standard" of *Red Lion* and *Associated Press* (Govt. Br. 13-14).

This contention is a marked departure from the Government's prior positions. In its brief to this Court

in *Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986), the Solicitor General urged that the *Red Lion* analysis is confined to cases involving "scarcity of the electromagnetic spectrum" and "has no application" to cable television. Brief for the United States in No. 85-390, at 20 n.13. When issuing prior must-carry rules, the FCC explicitly held the *Red Lion* framework inapplicable to cable. *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd. 864, ¶ 184 (1986). And in defending those prior rules before the D.C. Circuit, the Government affirmatively argued that *O'Brien* supplies "the correct test" (*Century*, 835 F.2d at 298).

Besides being novel, the Government's argument is wrong. In their opening briefs, appellants showed the inappositeness of *Associated Press* and its progeny. Whereas those cases involved conduct-regulating laws of general applicability, the must-carry law regulates speech, not conduct, and it aims specifically at the press. The Government concedes that the Sherman Act's status as a "statute of general applicability * * * was part of the rationale" of *Associated Press* (Govt. Br. 18). But it nevertheless discerns no meaningful difference between that case and this one, since *Associated Press* was "an as-applied challenge to a particular decree enforcing the Sherman Act" (*ibid.*). According to appellees, there is no distinction between the specific application of a general law to an industry (such as the press), and Congress' enactment of a statute that specifically targets the press. *See* Govt. Br. 18-19, INTV Br. 26-27.

Appellees' rejoinder is unpersuasive for two reasons. First, a general law can only be applied by

prosecutors and courts in specific cases. If the specific application of a general law were equivalent for First Amendment purposes to a law narrowly aimed at the press, this Court's insistence in *Associated Press* that the law be one of "general applicability" would be altogether meaningless.

Second, the must-carry law in any event is not equivalent to a judicial decree enforcing an antitrust law specifically against a member of the press. Such a decree could be entered only after a person had been found to have *violated* the antitrust laws. Needless to say, Congress made no finding that the hundreds of cable speakers whose speech is infringed by the must-carry law have committed antitrust violations. Quite the contrary: the evidence cited by Congress showed that 80% of cable systems had never dropped a single broadcaster. *See* Turner Br. 43. And there was no evidence that cable systems which dropped one or more broadcasters did so for anticompetitive reasons.

The must-carry law, far from redressing proven antitrust violations, is a purely prophylactic measure designed to suppress supposed anticompetitive "incentives." It broadly infringes the First Amendment rights of cable operators and cable programmers, regardless whether they ever have done, or ever will do, anything wrong. It resembles the "law of general applicability" at issue in *Associated Press* about as much as does a bill of attainder. Contrary to appellees' argument, therefore, the must-carry law is precisely the sort of statute that this Court has traditionally subjected to rigorous First Amendment review.

II. THE MUST-CARRY LAW IS UNCONSTITUTIONAL UNDER ANY FORM OF HEIGHTENED SCRUTINY

Whatever form of heightened scrutiny this Court deems appropriate, the statute's constitutionality hinges on the answers to two questions. The first is whether the Government has borne its burden of proving the existence of a problem necessitating a restriction of speech. The second question, assuming a problem exists, is whether Congress' solution addresses it in a narrow and careful manner. The answer to both questions is "no."

A. There Is No Problem Necessitating An Infringement Of Speech

1. In our opening brief (at 37-41), we showed that local broadcast television is currently thriving. Despite the absence of must-carry rules during the past eight years, broadcast stations have grown in wealth, number, and breadth of coverage. Even UHF stations, supposedly at greatest risk from predatory cable practices (INTV Br. 19), have doubled in number in the past decade, with 350 new UHF stations being added. *See* CFA Br. 20 n.12. The D.C. Circuit found no evidence in 1985 that "the economic health of local broadcast television is threatened by cable" (*Quincy*, 768 F.2d at 1455). Things have only gotten better for broadcasters since then.

In a feeble effort to show an existing problem, appellees rely on the 1988 FCC survey that Congress cited in positing 3,600 instances of noncarriage by cable systems nationwide. Govt. Br. 6, 40 n.27; NAB Br. 10-12; INTV Br. 18-19. We comprehensively discussed this survey in our opening brief (at 40-41). The

survey in fact reveals that cable operators carried 95% of the broadcast signals available for carriage, and 98% of the broadcast signals entitled to mandatory carriage under the FCC's 1986 rules. The survey, moreover, takes no account of broadcast stations that were *added* to cable systems; in fact, the number of broadcasters carried by cable systems increased by 7% between 1985 and 1990. And the survey is silent about the characteristics (*e.g.*, viewership) of the stations dropped, as well as the reasons why they were dropped. That being so, the survey justifies no inference that a single broadcaster was dropped for anticompetitive reasons.

Appellees do not rebut our arguments; they simply cite the survey as if it speaks for itself. They note Congress' finding that broadcasters who were dropped were usually replaced by a cable program network. Govt. Br. 6; NAB Br. 11; INTV Br. 18-19. But that creates no inference of anticompetitiveness. Since cable systems were carrying virtually all broadcasters anyway, the pool of uncarried broadcasters (as opposed to uncarried cable programmers) from which a replacement could be chosen was invariably small. And it is cable programmers, not local broadcasters, who are creating the kinds of innovative programming that subscribers increasingly want to see.

Some of the Government's *amici* cite their own experience in an effort to show that cable systems behave anticompetitively. The State of Connecticut notes that in early 1993—*after* passage of the 1992 Cable Act—two cable systems in southwest Connecticut announced their intention to drop five Connecticut broadcast stations (Conn. Br. 9-13). The systems had carried these broadcasters "for over a decade"

in the absence of must-carry rules (*id.* at 11). The 1992 Act, however, permitted these Connecticut broadcasters to be dropped: under the Act's odd definition of "local" broadcaster, they had no entitlement to mandatory carriage in the southwest corner of the State. *See id.* at 10-11.

Contrary to the State's assertion, this anecdote indicts rather than justifies the must-carry law. The fact that Connecticut's cable operators faithfully carried all local broadcasters for 10 years prior to the law's enactment supports our submission that it addresses a nonexistent problem. When Connecticut consumers expressed "their desire for continued carriage * * * of Connecticut's local broadcast stations," moreover, the cable operators rescinded plans to drop them. *See* Conn. Br. 12-13. This again shows the absence of a problem: if cable systems propose to stop carrying broadcasters that subscribers genuinely want to see, market forces alone suffice to ensure continued carriage.

More fundamentally, this Connecticut anecdote illustrates the essential vice of the must-carry law. The most logical explanation why a cable system would suddenly drop, in 1993, non-must-carry stations it had willingly carried during 1982-1992, is that it was forced to make room for must-carry stations that the Act foisted upon it. Indeed, the Act apparently required the two Connecticut cable systems to carry—regardless of local viewer preferences—stations from as far away as Poughkeepsie, New York; Riverhead, Long Island, and Newton, New Jersey. The Connecticut broadcasters, in short, were victimized by the very evil of which cable programmers like Discovery and The Learning Channel complain: lacking must-carry status, they risk being forced off cable systems to make room for Congress' preferred speakers.

Amicus Telemundo Group, a Spanish-language broadcaster, says that it has also encountered difficulty securing carriage on cable systems. Because its programming "is necessarily directed at the minority of the Nation's population that understands Spanish," it finds that certain cable operators "have strong incentives to exclude [its] signals and instead carry English-language programming on the limited number of available cable channels" (Br. 5). Once again, however, there is nothing in Telemundo's brief to suggest anticompetitive animus on any operator's part. Cable operators carry numerous and diverse foreign-language programmers. But there are legitimate reasons why a particular operator, considering its limited channel capacity and the characteristics of its subscriber base, would choose to carry English-language (or Chinese-language) programming instead of Spanish-language programming.

Appellees uniformly make the same error Telemundo makes. They assume, as a point requiring no proof, that any decision by a cable operator to carry a cable programmer instead of a broadcast programmer is *per se* anticompetitive. This assumption is illogical and wholly unjustified. The governmental interest that is alleged to support the must-carry law is not protection of marginal broadcasters from natural deaths, but protection of the local broadcasting *system* from *anticompetitive practices*. The fact that some broadcasters were not carried, or would not be carried, in the absence of such a law proves neither anticompetitive behavior by operators nor systemic damage to broadcasting.

2. Appellees tacitly concede that there is no evidence of an actual, current threat to local broadcasting. That is why they rely, with uniform emphasis, on Congress' "predictive judgment" about dangers that supposedly lurk down the road. Govt. Br. 31, 32; NAB Br. 13, 19, 41, 42, 45; INTV Br. 20-21. Cable systems are said to enjoy a "natural monopoly" giving them "bottleneck monopoly power" over "the only means by which a video speaker can reach its local audience." INTV Br. 6; NAB Br. 12; PBS Br. 35-36. And "Congress reasonably predicted," according to appellees, that "cable's incentive and ability to damage local broadcasting would increase in the future." INTV Br. 20; NAB Br. 13.

Such "predictive judgments" should be viewed skeptically where, as here, they substitute for hard evidence. This Court has held that the government's burden in justifying a restriction on speech "is not satisfied by mere speculation or conjecture"; it "must demonstrate that the harms it recites are real," *i.e.*, that "it is regulating speech in order to address what is in fact a serious problem." *Edenfield v. Fane*, 113 S.Ct. 1792, 1800, 1803 (1993). The FCC in *Century*, similarly embarrassed by its lack of proof, asked that the court defer to its "sound predictive judgment" about the need for must-carry rules. *See* 835 F.2d at 304. The D.C. Circuit wisely declined that invitation, holding that "speculative fears alone have never been held sufficient to justify trenching on First Amendment liberties" (*id.* at 300).

Here, as in the case of prior must-carry regimes, the Government has not "convincingly show[n] a problem to exist" (*Quincy*, 768 F.2d at 1455). The "predictive judgment" appellees impute to Congress is

based on two assumptions: that cable operators have and will continue to enjoy a "bottleneck monopoly" on distribution of video signals; and that cable systems will exploit "economic incentives" to use their monopoly power to destroy broadcasters. Neither assumption holds water.

a. The assertion that cable systems enjoy a "natural monopoly" (INTV Br. 6) is plainly incorrect. The claim that cable is a "natural monopoly" implies that "greater competition in cable markets would be infeasible and economically ruinous." Br. of U.S. Telephone Ass'n as *Amicus Curiae*, at 17. Congress made the opposite finding here, concluding that "cable markets, although currently concentrated, are not natural monopolies, and that competition should be encouraged as much as possible" (*id.* at 17).

Appellees' assertions that cable systems are "bottlenecks" controlling "the only means by which a video speaker can reach its local audience" (PBS Br. 35-36) are also wildly exaggerated. Americans watched television for dozens of years before cable existed. Even now, 40% of American households do not subscribe to cable. And cable is not the only alternative to conventional over-the-air reception. Millions of Americans currently subscribe to satellite or "wireless cable" service, which enables them to receive broadcast and other programming via satellite dishes. Through improvements in technology, moreover, Americans will soon have access to high-power direct broadcast satellite (DBS) service, "enabling viewers throughout the nation to receive approximately 150 channels of video programming using an 18-inch receiving dish." Br. of DirecTV, Inc., as *Amicus Curiae*,

at 1. *See* "Small-Dish TV Offers Wireless Revolution," Wash. Post, Dec. 18, 1993, at A1.

Nor is cable a "bottleneck" for those households that subscribe to it. No one disputes the existence of an "inexpensive hardware-store switch" (*Century*, 835 F.2d at 302), generally called an "A/B switch," that enables cable subscribers to alternate between cable and off-the-air reception of broadcast signals. The *Century* court, echoing the FCC's own findings, determined that consumers' switch-and-antenna capability represented a complete solution to the supposed "bottleneck" problem.

At the broadcasters' behest, Congress found that "the 'A/B' input selector antenna system is not an enduring or feasible method of distribution" (Act § 2(a)(18)). We showed in our opening brief (at 48-50) that Congress had no evidence to support this finding. It relied principally on the same 1986 study—commissioned by NAB—that the *Century* court considered and rejected. The D.C. Circuit termed this study "the spongiest of foundations for the FCC's asserted justification" and found it incompetent to justify even interim must-carry rules (835 F.2d at 300-302). The only subsequent evidence that Congress cited was a 1991 study by Mark Fratrik, NAB's in-house economist. Having been prepared by NAB's in-house economist, the Fratrik study is unlikely to have been biased in cable systems' favor. Yet even it shows huge improvements in consumers' switch-and-antenna capability between 1986 and 1991, demonstrating that A/B switches are more workable now than they were in 1987, when the FCC and the D.C. Circuit approved their feasibility.

Appellees recite Congress' comments on A/B switches and ignore our comments on the evidence. Govt. Br. 41; INTV Br. 15; PBS Br. 45. Appellee NAB tries to distinguish *Century* on the ground that "there was literally *nothing* in the record" of that case to support the FCC's conclusion. NAB Br. 15 n.32 (emphasis original). That statement is false: the *Century* court had before it, and rejected, the same NAB-commissioned study on which Congress in 1992 relied. Appellee PBS asserts that Congress' finding about A/B switches "drew on empirical studies conducted by the FCC after *Quincy* and *Century*." PBS Br. 34-35 n.30. That statement is false in two respects. Congress cited no empirical studies by the FCC concerning A/B switches. One of the studies Congress did cite, the 1986 NAB-commissioned study, pre-dated *Century* and was rejected by that court. And the only post-*Century* study that Congress cited was prepared, not by the FCC, but by NAB's in-house economist.[1]

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[1] As appellees note, Congress also "credited the FCC's conclusion that the cable industry encouraged its subscribers to take down their antennas and eliminate their capacity to receive signal[s] off-air." INTV Br. 18 (original quotation marks omitted). But this is ancient history. The FCC did censure this behavior by cable systems *in 1986*. For the past eight years, however, cable systems, pursuant to FCC rules (47 CFR § 76.66), have been informing subscribers about the need to *maintain* off-the-air reception capability. Appellees also observe that NCTA in the past has opposed A/B switch proposals. Govt. Br. 24 n.16; INTV Br. 18 n.14; NAB Br. 9. That opposition stemmed from concerns that mandatory provision and installation of A/B switches would impose significant costs on cable operators; it did not reflect a belief that A/B switches are unworkable in a technical sense.

Actual experience during the past year shows how illusory Congress' "bottleneck" theory is. The cable system in Corpus Christi, Texas, was forced to drop all three broadcast network affiliates after they refused retransmission consent. The system distributed thousands of A/B switches to its subscribers to enable them to receive broadcast signals during the blackout period. *Cable World*, Nov. 22, 1993, at 70. The broadcasters found that "being off cable more than six weeks didn't have [a] big impact" on them. *Warren's Cable Regulation Monitor*, Nov. 29, 1993, at 7. As the owner of the NBC affiliate put it: "As far as I know, 90 percent of my audience is getting the signal." *Cable World*, Nov. 8, 1993, at 12. When carried on cable, network affiliates normally capture about 70% of the total viewing audience; after a month off cable, the Corpus Christi network affiliates still had an audience share between 67% and 69%. *Warren's Cable Regulation Monitor*, Nov. 29, 1993, at 7. "I think we surprised a lot of young people," said one broadcast station owner. "They didn't know there were other ways to watch TV than through cable." *Ibid.* The local wireless operator also reported "a windfall of new subscribers," with several thousand subscribers switching from cable to satellite reception. *Cable World*, Nov. 8, 1993, at 12; *Cable World*, Nov. 22, 1993, at 70.[2]

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[2] The actual experience recounted in the text shows the error of appellees' assertion that A/B switches are difficult to install and/or operate. *See, e.g.*, NAB Br. 8-9; CFA Br. 24. Under FCC rules, a subscriber can get an A/B switch installed simply by telephoning his local cable system. *See* 47 CFR § 76.66(c). And operation of the device requires only flicking a switch.

In short, real-life experience shows that cable systems are not bottlenecks now. And there is even more reason to doubt Congress' "predictive judgment" that cable systems will be bottlenecks in the future. Most communities are now served by a single cable operator for two main reasons, both attributable to Congress. For decades, Congress has prohibited telephone companies from offering competing cable service. *See* 47 U.S.C. § 533(b). And Congress until 1992 permitted local franchising authorities to grant cable systems exclusive franchises.

The ban on telephone competition with cable has been declared unconstitutional under the First Amendment by a district court, and legislation to repeal the ban is pending. *See* Br. of U.S. Telephone Ass'n as *Amicus Curiae*, at 1-2. Congress in the 1992 Act forbade exclusive franchises (§ 7(a)(1)), and new companies have already sought approval to compete with current cable systems. *See, e.g.*, Conn. Br. 3 n.1. These new competitors join cable's existing competitors—satellite distributors—which are thriving. "Satellite dish sales are up 35%-40% since summer" and "satellite dish and programming distributors say [this] sudden peak in demand * * * is making it impossible to meet" customers' orders. *Warren's Cable Regulation Monitor*, Nov. 8, 1993, at 3. The first DBS satellite, moreover, was launched four days ago and will start broadcasting in April. *See* Washington Post, Dec. 18, 1993, at A1.

b. Secondly, even if there were merit in Congress' "predictive judgment" that cable systems will be the bottleneck of the future, there is no basis for assuming that they would abuse this position to broadcasters' detriment. In positing anticompetitive

incentives on operators' part, appellees rely almost entirely on supposed competition for advertising revenues. But neither Congress nor appellees lay out any economic logic to underpin this theory.

"Taken at its best, this theory would lend *no* support to § 5 of the Act (relating to noncommercial TV), as the educational stations do not advertise." J.S. App. 65a (Williams, J., dissenting). In the case of commercial stations, it is common ground that 80% of all commercial stations have declined must-carry protection and demanded payment for carriage under "retransmission consent" (Act § 6). *See* Discovery Br. 43; CFA Br. 33 nn.31-32. This is powerful evidence that competition for advertising revenues generally creates no incentive for cable systems to drop broadcasters. Indeed, cable systems have agreed to *pay* for the right to carry their most potent competitors for advertising dollars, despite their ability to refuse carriage to broadcasters that elect to forgo the must-carry privilege.

Appellees' theory about advertising revenues thus focuses on a very narrow slice of the broadcast industry: commercial broadcasters that are not popular enough confidently to withhold retransmission consent. But the relative unpopularity of such broadcasters makes their advertising revenues unfertile ground for poaching; and if such revenues did come up for grabs, powerful broadcast competitors would be as likely as cable operators to benefit. In any event, cable systems for the past eight years have had the same "economic incentives" to harm broadcasters that Congress thinks they have now. Yet as we have shown, and as appellees tacitly concede, there is simply no evidence that cable systems in the past have

damaged the local broadcasting system by anticompetitive acts.

B. If There Is A Problem, The Must-Carry Law Is An Unreasonable And Overbroad Solution

In assessing Congress' remedy, it is important to note the limited nature of the governmental interest at stake. The Solicitor General does not justify the must-carry law as mere welfare for local broadcasters who would fail in a freely competitive market. Nor could he. While that rationale might support a cash subsidy, it could not possibly justify aiding broadcasters by affirmatively *burdening* cable speakers' First Amendment rights.

The government's asserted interest is not to preserve particular marginal broadcasters, but to protect the local broadcasting *system* from *anticompetitive practices*. The question, then, is whether Congress can be said to have addressed this supposed problem in a "narrowly tailored" fashion by enacting a prophylactic rule giving all broadcasters a mandatory preference over all cable programmers on all cable systems. We think that question answers itself.

1. The must-carry law makes no sense either as a means of preserving localism or as a method of preventing anticompetitive practices. To the extent must-carry aims to ensure the survival of locally-originated programming, it is "grossly overinclusive" for the reasons stated by the D.C. Circuit in *Quincy* (768 F.2d at 1460). The statute indiscriminately prefers all broadcasters, even if they carry little local programming; and it penalizes all cable programmers, regardless of how much local programming they provide.

Nor is the must-carry law a "narrowly tailored" method of preventing anticompetitive acts. To the contrary: the statute prohibits cable systems from dropping a broadcaster *for any reason whatsoever*. If an operator wishes to substitute The Learning Channel for a local broadcaster that airs home-shopping commercials or sitcom reruns, the statute forbids it to do so, however innocuous its motivations. Viewer preferences and quality of programming are utterly irrelevant. This prophylactic approach might be said to prevent anticompetitive practices, as the Japanese internment law might be said to have prevented domestic insurrection during World War II. But neither law can be described as "narrowly tailored."

2. Although appellees say much about the need to ensure "access" to cable systems, they offer little explanation why an access rule must take a form that affirmatively discriminates against cable programmers. Appellee PBS, at a loss for an answer, simply asserts that cable programmers "lack standing to bring this facial constitutional challenge" because they "live in a harsh, competitive environment" that might preclude their carriage apart from section 5. PBS Br. 36 n.33. That is like arguing that a black person lacks standing to challenge a quota that makes it harder for her to get a job, on the theory that eliminating the quota would not guarantee her being hired.

Appellees seek to diffuse the law's discriminatory character by pointing to other provisions of the 1992 Act that help some cable programmers. *See* Govt. Br. 41-42; NAB Br. 34. These provisions bar certain anticompetitive practices against unaffiliated programmers (§ 12) and strengthen the leased-access provisions that "permit unaffiliated cable programmers to compel cable operators to grant them access" (NAB Br. 34). But if these "narrow, context-sensitive remedies" (*ibid.*) suffice to protect cable programmers, why are they not sufficient protection for broadcasters as well? Congress plainly decided that broadcasters merit *better* protection: an absolute guarantee of carriage, for free, even in the absence of anticompetitive practices, no matter how terrible the broadcaster's programming may be. The remedial provisions appellees cite merely underscore the must-carry law's discriminatory character.

Of all the appellees, NAB alone attempts to rationalize the discriminatory nature of Congress' remedy. It says that broadcasters merit greater protection because cable programmers "are not jeopardized by the same anticompetitive incentives" that cable operators assertedly have (NAB Br. 18, 33). These differential incentives allegedly center on two points: corporate affiliations and advertising revenues.

It is true that a cable system has little incentive to discriminate against a cable programmer with which it is affiliated. But if any discriminatory incentive exists, it is the same in the case of broadcasters and *unaffiliated* programmers, *i.e.*, independent programmers or programmers affiliated with other operators. Obviously, the vast majority of the 130 or so regional and national programmers seeking carriage on a cable system will have no affiliation with that particular operator. For the most part, therefore, cable programmers and broadcasters stand on precisely the same footing, and they merit precisely the same degree of protection.

Nor does differential competition for advertising revenues justify must-carry's discriminatory remedy.

The vast majority of advertising revenues earned by the cable industry are received by cable programmers. These revenues are derived from commercials inserted within the programmers' shows. It is of no consequence to the cable operator whether these revenues go to cable programmers or broadcasters; the operator does not receive the revenues in either event.

The only advertising revenues actually received by cable operators typically consist of "local avails." Operators routinely bargain with programmers for a few minutes of advertising time each hour, during which the operator is permitted to run local commercial advertisements. Apart from the must-carry law, however, there is no reason, economic or technological, why operators cannot negotiate the same deal with broadcasters. Indeed, operators have in fact negotiated such advertising arrangements in retransmission-consent discussions. *See Warren's Cable Regulation Monitor*, Nov. 15, 1993, at 10.

In short, there is no inherent reason why operators' desire to maximize advertising revenues should cause them to discriminate against broadcasters to the exclusion of cable programmers. A given broadcaster or cable programmer can agree, or disagree, to an operator's request for "local avails." If the operator discriminatorily refuses to carry someone that disagrees, the operator's behavior may be subject to appropriate sanction. But it should not matter whether the disagreeing party is a broadcaster or a cable programmer.

Finally, even if Congress were right in believing that broadcasters need greater protection, it would not justify the kind of discrimination worked by the must-carry law. The statute does not merely confer

on broadcasters a benefit that cable programmers do not receive, as would be true (for example) had Congress granted broadcasters a subsidy. Owing to cable systems' limited channel capacity, preferential access for broadcasters inevitably *burdens* cable programmers by making their own chances of securing access concomitantly smaller. This is the central vice of the must-carry law, and the feature that most compels its invalidation.

CONCLUSION

For these reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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